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Paper 44

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SOUTHFIELD MI 48034

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**DEC 03 2007**

**OFFICE OF PETITIONS**

In re REISSUE PATENT NO. RE38,216 :

Issue Date: August 12, 2003 :

Application No. 09/174,804 :

Filed: October 19, 1998 :

Title of Invention: **SCOOPED LACROSSE** :  
**HEAD**

ON PETITION

This is a decision on the petition filed under 37 CFR 1.378(b), January 19, 2007, to accept the delayed payment of the maintenance fee for the above-identified patent.

The petition is **DISMISSED**.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR 1.136(a) or (b). Any such petition for reconsideration must be accompanied by the petition fee of \$400.00 as set forth in 37 CFR 1.17(h). The petition for reconsideration should include an exhaustive attempt to provide the lacking item(s) noted below, since, after a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Commissioner.

The original patent issued October 29, 1996. The second maintenance fee due could have been paid during the period from October 29, 2003 through April 29, 2004 or with a surcharge during the period from April 30, 2004 through October 29, 2004. This patent expired on October 29, 2004 for failure to timely remit the maintenance fee.

A petition to accept the delayed maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) must be accompanied by (1) an adequate, verified showing that the delay was unavoidable, since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent, (2) payment of the appropriate maintenance fee, unless previously submitted, and (3) payment of the surcharge set forth in 37 CFR 1.20(l)(1).

This petition lacks item (1) above.

Petitioner, asserts that the delay in paying the second maintenance fee was

unavoidable in that the in spite of a properly functioning docketing system and in spite of assurances from an otherwise reliable staff person that the second maintenance fee had been paid, the maintenance was not paid. Petitioner claims that no Notice of Expiration was received from the United States Patent and Trademark Office (USPTO) and that they only learned that the patent had expired as a result of a lawsuit filed in a matter related to the instant patent.

A late maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 U.S.C. § 133 because 35 U.S.C. § 41(c)(1) uses identical language (i.e. "unavoidable delay").<sup>1</sup> Decisions reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable.<sup>2</sup> In this regard:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.<sup>3</sup>

As 35 U.S.C. § 41(c) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 U.S.C. § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees.<sup>4</sup> That is, an adequate showing that the delay was "unavoidable" within the meaning of 35 U.S.C. § 41(c) and 37 CFR 1.378(b)(3) requires a showing of the steps taken to ensure the timely

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<sup>1</sup>Ray v. Lehman, 55 F.3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995) (quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1989)).

<sup>2</sup>Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used by prudent and careful men in relation to their most important business").

<sup>3</sup>In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

<sup>4</sup>Ray, 55 F.3d at 609, 34 USPQ2d at 1788.

payment of the maintenance fees for this patent.<sup>5</sup>

The showing of record is inadequate to establish that the delay in timely paying the maintenance fee was unavoidable within the meaning of 37 CFR 1.378(b)(3).

Petitioner has not shown that payment of the maintenance fee was a clerical function reasonably expected to be performed by Latitia Ford thus that the failure to pay the maintenance fee was a clerical error in the course of her duties.

No evidence has been provided to establish that since Ms. Ford was not an Attorney or Agent registered to practice before the USPTO that there was no Attorney action involved in the process of paying maintenance fees other than to instruct Ms. Ford to "pay" the maintenance fees. The maintenance fee transmittal would have to have been signed by an Attorney or Agent registered to practice before the USPTO.

Further, in view of the later learned mental and physical condition and ultimate death from the conditions Mrs. Ford experienced, it would appear incumbent upon the petitioners to review Mrs. Ford's work to determine that all had been handled properly and thus perhaps the failure to pay the maintenance fee and expiration of the instant patent could have been determined earlier.

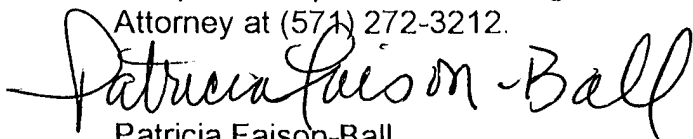
If petitioners are arguing that Mrs. Ford's actions or inactions caused the expiration of the patent and Mrs. Ford isn't available to affirm the assertion, it is incumbent upon the petitioner to demonstrate, via a documented showing, how the failure to pay the maintenance fee was due to a clerical error.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions  
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Alexandria VA 22313-1450

By FAX: (571) 273-8300  
Attn: Office of Petitions

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.



Patricia Faison-Ball  
Senior Petitions Attorney  
Office of Petitions

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<sup>5</sup>Id.



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A petition to accept the delayed maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) must be accompanied by (1) an adequate, verified showing that the delay was unavoidable, since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent, (2) payment of the appropriate maintenance fee, unless previously submitted, and (3) payment of the surcharge set forth in 37 CFR 1.20(l)(1).

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As 35 U.S.C. § 41(c) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 U.S.C. § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees.<sup>4</sup> That is, an adequate showing that the delay was "unavoidable" within the meaning of 35 U.S.C. § 41(c) and 37 CFR 1.378(b)(3) requires a showing of the steps taken to ensure the timely

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